No. 02-1315

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In The
Supreme Court of the United States

GARY LOCKE, Governor, individually and in his official capacity; MARCUS S. GASPARD, individually, and in his official capacity as Executive Director of the Higher Education Coordinating Board; BOB CRAVES, individually, and in his official capacity as Chair of the Higher Education Coordinating Board; JOHN KLACIK, individually, and in his official capacity as Associate Director of the Higher Education Coordinating Board,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AND THE CENTER FOR EDUCATION REFORM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Institute for Justice is a 501(c)(3) nonprofit, public interest law firm dedicated to protecting individual liberties. One of the core areas on which the Institute focuses its activities is the promotion of parental choice in education. Since its founding 12 years ago, the Institute has participated in the defense of every parental choice program passed by the various state legislatures, usually by representing as defendant-intervenors parents of schoolchildren attending schools using scholarships/vouchers made available under these programs. The Institute has also represented parents seeking to send their children to religious schools under the longstanding parental choice programs of Maine and Vermont, which have excluded families choosing such schools since 1961 and 1981, respectively. In both sorts of cases, a primary legal issue has been whether the inclusion of parental options to choose a religious school for their children to attend comports with the federal and state constitutions' religion clauses.

For example, the Institute for Justice represented five families using scholarships made available by the Cleveland Pilot Scholarship Program to attend religious schools, a practice challenged first in the Ohio courts and then in the federal courts, culminating in last June's upholding of

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[1] Counsel for the parties have consented to the filing of this brief, and copies of letters indicating that consent are filed with this brief. Counsel for the parties did not author this brief in whole or in part. No person or entity, other than *amici curiae* Institute for Justice and Center for Education Reform, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

the inclusion of the religious school option in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). During the state court phase of that litigation, the Ohio Supreme Court had upheld the constitutionality of the program under the "compelled support" clause of the Ohio Constitution, as well as under the Establishment Clause. *See Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). Similarly, in another case in which the Institute represented participating parents, the Wisconsin Supreme Court upheld the Milwaukee scholarship program against challenges that it violated the Wisconsin Constitution's "compelled support" clause and "Blaine Amendment" by allowing parents to choose religious schools, as well as rejecting an Establishment Clause challenge. *See Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998).

With this Court's resolution of the constitutionality of including religious school options under the Establishment Clause, the opponents of the inclusion of such options are left with reliance on state religion clauses. Many state supreme courts have, unlike those of Ohio and Wisconsin, held that their religion clauses prohibit what the federal Constitution now clearly permits, the inclusion of religious school options among parents' choices. This has occurred both in scholarship/voucher-type programs and in other sorts of educational programs where this Court has upheld the inclusion under federal religion clause principles.

In order to ensure that parental choice programs consistent with the federal Constitution can be available in all states that wish to enact them, the Institute has begun a campaign to clarify that these state religion clauses infringe on federally-protected rights under the federal religion clauses, the Free Speech Clause, and the Equal Protection Clause. It is in pursuit of that objective

that the Institute for Justice offers this *amicus* brief in support of Petitioner's efforts to obtain review by this Court of the Ninth Circuit's decision in *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2003). We have informed both Petitioner and Respondent, however, that were this Court to grant certiorari, we would seek to participate as *amicus curiae* in support of Respondent's position on the merits, *i.e.*, that the Ninth Circuit correctly held that Washington State's Blaine Amendment infringed Respondent's Free Exercise of Religion rights by mandating the denial of a scholarship because he chose to study theology at a religious college.[2]

The Center for Education Reform is a national, independent, non-profit advocacy organization founded in 1993 that advances programs and practical information to improve quality K-12 education and provides guidance and support to parents and teachers, community and civic groups, policymakers, grassroots leaders, and all other interested citizens who are working to bring fundamental reform to their schools. CER joins the *amici* brief in this case as a continuation of its commitment to ensure that parents are given and have equal access to quality education programs.

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[2] Indeed, the Institute for Justice's interest is more concrete and immediate than simply our overall objective of reining in overbroad interpretations of state religion clauses. We currently represent several individuals in Washington State who have filed suit challenging the policy of certain Washington public higher education institutions that refuse to allow students to do their student teaching or administrative internships in religious schools while allowing them to perform them in nonreligious private schools.

Last year, CER filed an *amicus* brief on behalf of more than two dozen other education and civic groups in *Zelman* because of the importance of parents, not systems, in determining the best education for their children. CER supports the Court's resolution in *Zelman* that was based on this notion. CER's interest in the *Locke* case is based on the practical reality that state religion clauses, like the one at issue here, prevent parents from one important form of education that should be equally available to them, namely, that of accessing religious education options that were held to be legally permissible according to this court's ruling in *Zelman*. The restrictive nature of the religion clause in Washington's Constitution discriminates against the families that would use state monies to independently choose a religious education to address the educational needs of themselves or their children.

In the context of ensuring that state monies be spent to provide educational opportunities to children, it is important to distinguish between the state's mandate of allowing funds to go only to schools it deems appropriate and schools that can succeed in accomplishing that which the state set out to accomplish in making education a right under its constitution. For parents to be able to participate in the education of their children, they need latitude in making decisions about where to direct state-authorized monies, as affirmed in *Zelman*. CER joins with fellow *amici* in urging this Court to grant the writ and provide the state and federal courts with guidance on the need to protect federal rights under the First and Fourteenth Amendments.

SUMMARY OF THE ARGUMENT

The issue of whether interpretations of state religion clauses such as Washington's Blaine Amendment conflict with federal constitutional rights arises frequently and has engendered a wide array of conflicts demanding resolution by this Court. The Ninth Circuit's decision below in *Davey v. Locke* conflicts directly with the Washington Supreme Court's resolution of the identical issue in *Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash.), *cert. denied*, 493 U.S. 850 (1989). It also conflicts with recent decisions of the First Circuit in *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999); and of the supreme courts of Maine, *Bagley v. Raymond School Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999); Vermont, *Chittenden Town Sch. Dist. v. Dep't of Ed.*, 738 A.2d 539 (Vt.), *cert. denied*, 528 U.S. 1066 (1999); and Puerto Rico, *Association de Maestros v. Torres*, 137 D.P.R. 528, 1994 PR Sup. LEXIS 341 (1994). In addition, there are many cases in which state supreme courts have interpreted their constitutions' religion clauses in ways that conflict with recent precedents of this Court interpreting the Free Exercise and Free Speech Clauses.

Taken all together, these various interpretations have caused widespread deprivations of fundamental federal constitutional rights. In the mistaken belief that it is permissible for them to interpret their state constitutional religion clauses in a more restrictive fashion than this Court has interpreted the Establishment Clause, state supreme courts and attorneys general have failed to understand the interplay of the Establishment and Free Exercise Clauses and the extent to which those clauses mandate a neutral stance towards religion by all levels of government, federal, state, and local. While in several of

its cases this Court has refused to allow these state constitutional interpretations to justify clear violations of federal standards, *see, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981), states will continue to discriminate against religion until this Court issues a definitive decision telling the states that their broad interpretations violate the religious neutrality mandated by the federal Constitution.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION BELOW IN *DAVEY* CONFLICTS WITH THE WASHINGTON SUPREME COURT'S DECISION IN *WITTERS*.

In 1986 this Court issued that rarest of all decisions, a unanimous decision interpreting the Establishment Clause. In *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), this Court held that the Establishment Clause was not violated by a program that permitted Larry Witters to use state-supplied vocational rehabilitation funds to attend a religious college to pursue training to become a religious worker.[3] Finding that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients," this Court concluded that "it does not seem appropriate to view any aid ultimately flowing to the Inland School of the Bible as resulting from a *state* action sponsoring or subsidizing religion." *Id.* at 488. Having

[3] The private Christian college Witters was attending prepared its graduates to be pastors, missionaries, or youth directors.

overruled the Washington Supreme Court's contrary decision on the Establishment Clause, this Court remanded the case to the Washington Supreme Court for it to consider the (in the Washington Supreme Court's words) "'far stricter' dictates of the Washington State Constitution." *Id.* at 489 (*quoting Witters v. Commission for the Blind*, 102 Wash. 2d 624, 626, 689 P.2d 53, 55 (1984)).

On remand, the Washington Supreme Court again ruled against Witters, this time in a 4-3 decision in which the dissenters argued that the majority's interpretation of Washington's Blaine Amendment, Article I, section 11, violated Witters' rights under the Free Exercise Clause. *Witters v. Washington Commission for the Blind*, 771 P.2d 1119 (Wash. 1989). Mr. Witters again petitioned this Court for review, but this time the Court denied certiorari. 493 U.S. 850 (1989). Washington State has continued to interpret its Blaine Amendment to require the exclusion of religious schools from programs where the beneficiaries choose the schools they wish to attend.[4] This non-neutral interpretation has led the state to deny Respondent Davey the "Promise Scholarship" to which he is otherwise entitled because he desires to use it in pursuing a major in Pastoral Studies at Northwest College, an accredited institution affiliated with the Assembly of God, and clearly what this Court used to call a "pervasively sectarian institution."

The Ninth Circuit's decision holding that Washington's denial of the Promise Scholarship violates Davey's rights under the Free Exercise Clause is thus in direct

[4] See footnote 2, *infra*.

conflict with the Washington Supreme Court's opposite conclusion with respect to the Free Exercise Clause in its *Witters* decision. Indeed, it was this Court's refusal to review that *Witters* decision that has set the stage for this conflict, and for Washington State to continue denying the federal constitutional rights of individuals such as Davey. Only a decision on the merits by this Court can resolve this conflict.

II. THE NINTH CIRCUIT'S DECISION IN *DAVEY* CONFLICTS WITH DECISIONS OF THE FIRST CIRCUIT AND THE SUPREME COURTS OF MAINE, VERMONT, AND PUERTO RICO.

At least four appellate courts subordinate to this Court have ruled in similar cases that the exclusion of the choice of religious options from a program allowing the program's beneficiaries to make a free and independent choice of educational provider does not violate the Free Exercise Clause. One appellate court, like the Ninth Circuit below, has concluded that such an exclusion does in fact violate the Free Exercise Clause. In the aftermath of this Court's decision upholding the Cleveland Pilot Scholarship program in *Zelman v. Simmons-Harris*, one can expect this issue to arise with increasing frequency as state legislatures consider parental-choice programs to address the chronic and continuing crisis in American public education.[5]

[5] The legislatures of Colorado, Louisiana, New Hampshire, and Texas are currently considering legislative proposals for parental-choice programs.

In *Strout v. Albanese*, 178 F.3d 57, *cert. denied*, 528 U.S. 931 (1999), the First Circuit rejected the plaintiffs' arguments that the Free Exercise Clause forbade Maine's exclusion of parents' ability to choose an otherwise eligible religious school for their children's education. Under Maine's tuitioning system, school districts that choose not to operate public schools for some or all grades must pay tuition to public schools operated by other districts or private schools on behalf of their resident students. The children's parents have the responsibility of selecting the schools their children attend, but since 1981 Maine has excluded religious schools from those parents can select. Although Maine's exclusion was due to a now clearly erroneous reading of the Establishment Clause, while Washington's similar action is based on its Blaine Amendment, in both cases the courts rejected the argument that the Free Exercise Clause mandated equal treatment of religious options, a position diametrically opposed to that of the Ninth Circuit in *Davey*.

In a lawsuit parallel to *Strout*, the Maine Supreme Judicial Court had earlier considered the same question involving the tuitioning system, and held that the Free Exercise Clause did not require the inclusion of religious private schools among the private schools parents could choose. *See Bagley v. Raymond School Dep't*, 728 A.2d 127, *cert. denied*, 528 U.S. 947 (1999). It, too, concluded that the Establishment Clause required the State to eliminate that option, relying on this Court's decision in *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), rather than the later Establishment Clause cases this Court looked to in the *Zelman* case.

Shortly after the First Circuit decided *Strout* and the Maine Supreme Court decided *Bagley*, the Vermont

Supreme Court addressed the question of whether parents could be denied the option of choosing religious schools under its tuitioning system. For all intents and purposes, the Vermont system is the same as Maine's, but in 1994 in *Campbell v. Manchester Bd. of Sch. Dirs.*, 641 A.2d 352 (1994), the Vermont Supreme Court had anticipated this Court's decision in *Zelman* and held that the Establishment Clause did not require that parents be denied the opportunity of choosing otherwise eligible religious schools. Five years later, after a school district challenged the Vermont Department of Education's refusal to let the district pay tuition for students attending such a school, the Vermont Supreme Court reinterpreted its "compelled support" religion clause[6] in its state constitution to forbid the payments. *See Chittenden Town Sch. Dist. v. Dep't of Education*, 738 A.2d 539, *cert. denied*, 528 U.S. 1066 (1999). The Vermont Supreme Court summarily rejected the arguments of the district and intervening parents with children attending a religious school that the Free Exercise Clause was violated by the unequal treatment of the religious option. *Id.* at 563. The Vermont decision demonstrates that compelled support clauses, like the Blaine Amendments in the constitutions of Washington and so many other states, are also susceptible of interpretations more restrictive than the Establishment Clause that infringe federal constitutional rights protecting religious liberty.

[6] Article I, section 3 of the Vermont constitution states that "no person ought to . . . be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Similar provisions are found in 28 other state constitutions.

Like Washington State, the Commonwealth of Puerto Rico has a Blaine Amendment in its constitution, and for the same reason, the U.S. Congress required it to include the Amendment through enabling legislation.[7] In 1994, the Supreme Court of Puerto Rico used its Blaine Amendment to invalidate an innovative school choice program because it permitted parents to use scholarships to send their children to religious schools, among others, in much the same way Washington refuses to allow students to use Promise Scholarships to pursue theology degrees from religious colleges. The Puerto Rico Supreme Court held that the scholarships constituted aid to the private schools, even though they are plainly aid to the families. While the Maine and Vermont tuitioning systems continue without the participation of religious schools, the Puerto Rico program was terminated in its entirety by the Puerto Rico Supreme Court.

We also note that a trial court in Florida recently held that Florida's Opportunity Scholarship Program violates Florida's Blaine Amendment by including religious schools. *See Holmes v. Bush*, Case No. CV 99-3370, Leon County Circuit Ct. (Aug. 5, 2002). Under Florida's program, parents with children in failing public schools are offered scholarships they can use to transfer to non-failing public schools or participating private schools. The trial court concluded that because parents could choose religious schools the program was unconstitutional aid to the religious schools. The appeal of this decision was heard by the Florida District Court of Appeal on March 18, 2003,

[7] See the Puerto Rico Federal Relations Act (also known as "the Jones Act"), 39 Stat. 951 (1917).

and a decision is pending. The trial court ignored the state and parents' arguments that to exclude the option of selecting a religious school discriminated based upon religion under the federal Constitution.

Lining up with the Ninth Circuit, the Eighth Circuit has decided a similar issue. In *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998), the defendants refused to provide paraprofessional services on site to disabled students enrolled in sectarian schools, while providing such services on site in nonsectarian private schools. By singling out those families who selected a sectarian school for their children's education, the state of Minnesota drew a line based upon religion. Finding no justification for excluding children in religious schools from the benefits of the program, the Eighth Circuit held that the state statute and corresponding policies violated the plaintiffs' rights to free exercise of religion, free speech, and equal protection of the laws. Thus, the Eighth Circuit stands with the Ninth Circuit in conflicting with the decisions of the First Circuit and Washington, Maine, Vermont, and Puerto Rico supreme courts.

III. MANY OTHER STATES BESIDES WASHINGTON HAVE INTERPRETED THEIR STATE CONSTITUTIONS' RELIGION CLAUSES AS IMPOSING A MORE RESTRICTIVE STANDARD THAN THE ESTABLISHMENT CLAUSE DOES.

The decisions of the supreme courts of Washington (*Witters*), Vermont (*Chittenden*), and Puerto Rico (*Maestros*)[8] are the tip of an iceberg of state decisions holding that state constitutional religion clauses prohibit the inclusion of religious school options in programs where the Establishment Clause permits the inclusion. *Davey*'s holding that the Free Exercise Clause is violated by excluding the choice of religious schools solely because they are religious puts it in conflict with these decisions as well. In two areas where this Court has upheld including individuals selecting religious schools on an equal basis – transportation subsidies and textbook loans – numerous state supreme courts have struck down their legislatures' efforts to enact similar legislation.

This Court's modern Establishment Clause jurisprudence began in 1947 with *Everson v. Board of Ed.*, 330 U.S. 1 (1947), in which this Court upheld a New Jersey statute providing transportation subsidies for all schoolchildren, including those attending religious schools. Applying a "child benefit" theory that the religiously-neutral subsidies aided the children and their families rather than the schools, this Court intimated that to have

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[8] We do not include the Maine Supreme Judicial Court on this list because its decision in *Bagley* did not involve its religion clause but rather an erroneous interpretation of the Establishment Clause as permitting the exclusion of the choice of religious schools.

excluded families because they had selected a religious school for their children would have violated their free exercise rights. 330 U.S. at 16.[9] Notwithstanding this Court's clear enunciation of a standard of religious neutrality as a key interpretive principle under the First Amendment, numerous state supreme courts proceeded to interpret their state constitutions' religion clauses to exclude transportation benefits for families selecting religious schools for their children's education.

The earliest post-*Everson* state court decision[10] disallowing the transporting of students to religious schools under a state religion clause came from Washington in

[9] The Court said in this regard that:

> New Jersey cannot consistently with the "establishment of religion" clause contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the [First] amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion.
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> * * *
>
> That Amendment requires the state to be a neutral in its relationship with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used to handicap religions as it is to favor them.

Id. at 16-18.

[10] In our discussions of the transportation and textbook cases we include only post-*Everson* and post-*Allen* decisions because in those cases it is clear that the state courts are applying more restrictive interpretations than that given by this Court under the Establishment Clause. There are a number of pre-*Everson* and pre-*Allen* cases holding that state constitutional religion clauses prohibit participation by those choosing religious schools, but because this Court had not yet ruled on the federal question, the state courts were not knowingly deviating from federal precedent.

Visser v. Nooksack Valley School Dist., 207 P.2d 198 (Wash. 1949). *Visser* was followed by similar decisions in Missouri, *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953); Alaska, *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961); Wisconsin, *State ex rel. Reynolds v. Nussbaum*, 115 N.W.2d 761 (Wisc. 1962); Oklahoma, *Board of Ed. v. Antone*, 384 P.2d 911 (Okla. 1963); Delaware, *Opinion of the Justices*, 216 A.2d 668 (Del. Sup. 1966); Hawaii, *Spears v. Honda*, 449 P.2d 130 (Haw. 1968); and Idaho, *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971). In all these decisions the state courts interpreted their constitutions to prohibit inclusion of religious school students in programs permitted by the federal religion clauses.

In 1968, in *Board of Ed. v. Allen*, 392 U.S. 236 (1968), this Court upheld a New York program providing for loans of secular textbooks to all students, including those enrolled in religious schools. Thereafter, as occurred with the transportation programs, a number of state supreme courts interpreted their religion clauses to be more restrictive than the federal religion clauses. *Gaffney v. Dep't of Ed.*, 220 N.W.2d 550 (Neb. 1974); *Pastor v. Tussey*, 512 S.W.2d 97 (Mo. 1974); *McDonald v. School Bd.*, 246 N.W.2d 93 (S.D. 1976); *Bloom v. School Comm.*, 379 N.E.2d 578 (Mass. 1978); *California Teachers Ass'n v. Riles*, 632 P.2d 953 (Cal. 1981); and *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983). Once again, these state supreme courts were interpreting their state religion clauses more restrictively to prohibit the inclusion of families using religious schools from a generally available benefit program that was permissible under the First Amendment.

IV. THIS COURT'S INTERPRETATION OF THE FIRST AMENDMENT DOES NOT PERMIT STATE COURTS TO APPLY MORE RESTRICTIVE INTERPRETATIONS OF STATE RELIGION CLAUSES TO EXCLUDE PERSONS FREELY CHOOSING RELIGIOUS OPTIONS.

Some members of this Court have noted that state Blaine Amendments are not a benign expression of a desire for a stricter separation of church and state.[11] Rather, they are a shameful legacy of this Nation's Protestant majority's historical anti-Catholic bigotry. Just as Massachusetts enacted the first proto-Blaine amendment in 1854[12] when the nativist, anti-immigrant Know-Nothing Party took control of the Massachusetts state government,[13] the bulk of state Blaine Amendments were enacted beginning in the mid-to-late 1870's during another wave of anti-Catholic sentiment occasioned in part by efforts of the Catholic Church to obtain funding for its schools equal to that provided to the then-nondenominationally Protestant public schools.[14] While the federal Blaine Amendment narrowly failed to obtain the two-thirds majorities required to amend the federal constitution, the anti-Catholic

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[11] See Justice Thomas' plurality opinion in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), where he says "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'"

[12] Article XVIII was adopted by the legislatures of 1854 and 1855, and approved and ratified by the people in 1855.

[13] Mulkern, *The Know-Nothing Party in Massachusetts* 76 (1990).

[14] See generally Jorgenson, *The State and the Non-Public School: 1825-1925* (1987).

Republican majorities in both houses of Congress had more than enough votes to require through enabling legislation that new applicants for statehood put Blaine Amendments into their state constitutions. Washington's Blaine Amendment, which led the state to take away Respondent Davey's Promise Scholarship when he declared a religious major at a religious college, is a typical example of such an Amendment, required by the Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889), the enabling legislation for the admission of South Dakota, North Dakota, Montana, and Washington. Other states with Blaine Amendments in their constitutions have relied on those provisions to justify excluding religious groups from otherwise neutral government programs. For example, Missouri offered its Blaine Amendment as a compelling interest in seeking to justify the exclusion of religious groups from equal treatment with non-religious groups offered free meeting space at the University of Missouri. Finding no Establishment Clause problem with providing that space on an equal basis, this Court rejected the Blaine Amendment as a defense in *Widmar v. Vincent*, 454 U.S. 263 (1981). Similarly, in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court held that the state university could not exclude student publications with religious viewpoints from a program providing publication subsidies to all other student publications from student activities fees. This Court noted that its decision was consistent with a line of cases running from *Widmar* through *Board of Ed. v. Mergens*, 496 U.S. 226 (1990), and *Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. 384 (1993), and continued, in *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

When states like Washington and Vermont rely on state religion clauses to exclude students from benefit programs based solely on their having freely chosen a religious provider, they violate the Free Exercise rights of believers, as well as their rights to free speech and equal protection of the laws. As this Court said in *Rosenberger* about its initial foray into the Establishment Clause in *Everson*:

> There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must 'be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens regardless of their religious belief.' [*Citing Everson*, 330 U.S. at 16] We have held that the ***guarantee of neutrality*** is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.

Rosenberger, 515 U.S. at 839 (emphasis added). As the foregoing discussion of the conflicts between the Ninth Circuit's correct decision in *Davey v. Locke* below and a plethora of decisions by other appellate courts, both state and federal, demonstrates, many courts feel free to discriminate against religious options. The time is overdue for this Court to resolve these conflicts and instruct the lower courts that the federal Constitution's command of religious neutrality cannot be undermined by interpretations of state religion clauses that violate religious liberty.

CONCLUSION

Amici respectfully urge this court to grant Petitioner's request for a grant of certiorari.

Respectfully submitted,

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